Virginia Manufacturing Company, Inc. *and* Bobby Duncan *and* Steve Birman *and* Jimmy Crusenberry *and* Randy Woodard *and* United Mine Workers of America District 28, Sub-District 3, AFL–CIO. Cases 11–CA–14621–2, 11–CA–14621–3, 11–CA–14621–4, 11–CA–14621–5, and 11–CA–14766

May 7, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On July 7, 1992, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union each filed briefs answering the Respondent's exceptions, and the Respondent filed a brief in reply to the General Counsel's answering brief.[1] In addition, the General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed a brief answering the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified.

The General Counsel has excepted, inter alia, to the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) of the Act through an implied threat of discharge for concerted activities made by Plant Superintendent Daniel Hurd to employee Steven Birman. For the following reasons we find merit to the exception.

As more fully detailed in the judge's decision, on the morning of June 20, 1991, certain production and maintenance employees initiated an economic strike at the Respondent's manufacturing facility. Prior to the 7 a.m. start of the morning shift, employees discussed among themselves issues involving certain terms and conditions of employment which they wished to take up with management. As set forth in section II,B,2(c) of the judge's decision, one of the employees who engaged in this discussion was Steven Birman. When the shift buzzer sounded, Birman decided to join the striking employees. As he was leaving, he stopped to tell Plant Superintendent Hurd why he was joining the strike. It is clear from the circumstances that Hurd knew at the time that a concerted work stoppage was in progress. When Birman asked whether Hurd was aware of the employees' complaints, Hurd answered no. In response to Birman's attempt to explain the issues, Hurd gave a ''cold shoulder'' shrug. Birman then started to leave, and Hurd took him by the arm, turned him around, and said ''Steve, it's your job.'' Birman pulled away, and Hurd told him to leave the property. Birman then joined the strikers.

The judge stated that he would have agreed with the General Counsel that Hurd had unlawfully threatened Birman with discharge if he joined the strike, but for the absence of evidence establishing that Hurd knew at the time that the work stoppage was directed toward improving terms and conditions of employment, i.e., that it was protected by the Act. Accordingly, he dismissed this allegation of the complaint. We disagree with the judge and we find that Hurd's statement was a discharge threat violating Section 8(a)(1).

The fact of the matter is that Hurd was offered the opportunity, by Birman, to learn of the nature of the employees' walkout, and he rejected it, literally shrugging it off. At the same time, he was aware that a concerted employee protest of some kind was underway. In these circumstances, ''Respondent cannot blind itself to the surrounding actions and claim that it did not know the walkout was based upon a protected activity.'' *Eaton Warehousing Co.*, 297 NLRB 958, 961–962 (l990), enfd. mem. 919 F.2d 141 (6th Cir. 1990). The Respondent's refusal, through Hurd, to permit communication of the nature of the employees' complaints was an action in which the Respondent engaged at its peril. We impute to the Respondent constructive knowledge of the protected nature of the employees' strike at the time of Hurd's statement to Birman. Id. at 962. Accordingly, we conclude that his statement—''Steve, it's your job''—in the circumstances violated Section 8(a)(1) because it was a threat of discharge should Birman join the walkout.[3]

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties. Further, the Respondent's motion to strike the Union's brief answering the Respondent's exceptions is denied because the brief, in fact, was timely filed. In addition, the General Counsel's motion to strike references in the Respondent's exceptions brief to a motion filed in Case 11–CB–2035 is denied, because, although not part of the record in the instant proceeding, the motion in the CB proceeding is subject to administrative notice.

[2] We agree with the judge that the Respondent condoned any strike misconduct in which the four discriminatees may have engaged. Accordingly, we find it unnecessary to address the judge's summary of evidence concerning alleged misconduct at sec. II,C,2(a) through (e) of his decision, much of which involves unresolved factual conflicts. In addition, we agree with the General Counsel, and not with the judge, that it is appropriate to find that the Respondent violated Sec. 8(a)(3), as alleged in the complaint, as well as Sec. 8(a)(1), in discharging the four discriminatees for the asserted strike misconduct, because the Respondent had previously condoned it. See, e.g., *Circuit-Wise, Inc.*, 308 NLRB 1091, 1103 (1992); *White Oak Coal Co.*, 295 NLRB 567, 571 (1989).

[3] In sec. II,B,2(b) of his decision, the judge dismissed a separate 8(a)(1) allegation involving a statement by Hurd to employee Tim *Continued*

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Virginia Manufacturing Company, Inc., Pennington Gap, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

l. Insert the following as paragraph 1(c) and reletter the subsequent paragraph as 1(d).

''(c) Threatening employees with discharge if they join or support a protected strike.''

2. Substitute the attached notice for that of the administrative law judge.

Jones on the morning of June 20, 1991; the judge relied in part on the lack of evidence that Hurd was aware of any protected, concerted activity at the time. The record establishes that when Hurd directed Jones and other employees, who were standing around packing line 1 waiting for assignments, to get to work in 3 minutes or hit the clock, these employees in fact were not engaged in protected, concerted activity. We rely on this in affirming his dismissal.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in concerted activities protected by the National Labor Relations Act.

WE WILL NOT threaten you with discipline if you join or honor a protected strike.

WE WILL NOT threaten you with discharge if you join or honor a protected strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer the four employees named below immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest:

Bobby Duncan	Jimmy Crusenberry
Steve Birman	Randy Woodard

WE WILL notify each employee that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

VIRGINIA MANUFACTURING COMPANY, INC.

Rosetta B. Lane, Esq., for the General Counsel.
Gary W. Wright, Esq. and *Jeffrey R. Murrell, Esq. (Wimberly & Lawson)*, of Knoxville, Tennessee, for the Respondent.
James J. Vergara Jr., Esq. (Vergara & Associates), of Hopewell, Virginia, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a discharge case. VAMCO, as the company is known, fired the four individual Charging Parties on September 4, 1991, for unspecified misconduct which they allegedly engaged in during a strike of June 20 to August 9, 1991. I do not resolve the disputed misconduct issue because I find that VAMCO condoned any disqualifying misconduct the four may have engaged in. I order VAMCO to offer the four immediate and full reinstatement and to make them whole, plus interest. Of the seven independent 8(a)(1) allegation paragraphs, I dismiss six, finding merit to one threat allegation.

I presided at this 5-day trial beginning January 7, 1992, in Norton, Virginia, and concluding February 11, in Big Stone Gap, Virginia.[1] The trial pleading is a December 24, 1991 order consolidating cases, consolidated complaint and amended notice of hearing (complaint) issued by the General Counsel of the National Labor Relations Board through the Acting Regional Director for Region 11 of the Board. All dates are for 1991 unless otherwise indicated.

The complaint is based on charges filed September 6 by Brian K. Marsee (Marsee) in Case 11–CA–14621, on September 9 by Bobby Duncan (Duncan) in Case 11–CA–14621–2, by Steve Birman (Birman) in Case 11–CA–14621–3, by Jimmy W. Crusenberry (Crusenberry) in Case 11–CA–14621–4, by Randy Woodard in Case 11–CA–14621–5 on September 16, and by the United Mine Workers of America, District 28, Sub-District 3, AFL–CIO (UMW or Union) on November 25, amended December 16, 1991, and again on

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[1] Norton and Big Stone Gap lie along U.S. Route 23, a highway running from Florida to northern Michigan, fabled in song (Dwight Yoakam's 1987 ''Readin', Rightin', Rt. 23'') as the road for those leaving Appalachia for an illusory better life working in northern factories. Big Stone Gap is itself the situs of John Fox Jr.'s 1908 novel, ''The Trail of the Lonesome Pine,'' three times made into a Hollywood motion picture. D. Wax, *Welcome To John Fox, Jr.'s Lonesome Pine Country* (1990).

December 24, against Virginia Manufacturing Company, Inc. (Respondent, Company, or VAMCO).

The General Counsel alleges in the complaint that Respondent VAMCO violated Section 8(a)(1) of the Act about June 20 by threatening employees with the futility of their striking, with discharge or other discipline if they continued striking or because they did strike; about June 23 by threatening employees with unspecified reprisals because they had engaged in union activities; and about June 26 by threatening employees with unspecified reprisals because they had engaged in union activities, and by threatening an employee with discharge because of his union activities.

The complaint alleges that Company violated Section 8(a)(3) by discharging, on September 4, employees Brian K. Marsee, Bobby Duncan, Steve Birman, Jimmy Crusenberry, and Randy Woodard. When The General Counsel and the Union rested their cases in chief, VAMCO moved to dismiss the complaint as to Marsee for lack of supporting evidence. Marsee did not testify. The General Counsel stated that the Government did not oppose, and Union's counsel stated that he did not represent Marsee and had no objection. I granted the motion to dismiss the complaint as to Marsee. (2:452–459.)[2] The parties have treated Marsee's dismissal as a deletion of Case 11–CA–14261 from the complaint's caption as well as from the allegations. Because of this, and as there is no limitations problem, I shall do likewise.

By its answer, the Company admits certain facts but denies violating the Act. VAMCO's answer admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel[3] and VAMCO,[4] I make the following

FINDINGS OF FACT

I. JURISDICTION

VAMCO is a Virginia corporation with a facility located at Pennington Gap, Virginia, where it manufactures and sells at nonretail case goods and containers. During the past 12 months, the Company sold and shipped from its Pennington Gap facility products valued at $50,000 or more direct to points outside the State of Virginia. Although the complaint does not so allege, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[2] References to the five-volume transcript of testimony are by volume and page. Exhibits are designated G.C. Exh. for the General Counsel's, U. Exh. for the Union's, R. Exh. for VAMCO's, and Jt. Exh. for the joint exhibits.

[3] The General Counsel attached a proposed order and a proposed notice to the Government's brief.

[4] The Company's unopposed motion for leave to file a three-page reply brief, dated March 30, 1992, to the General Counsel's posthearing brief is granted. *Fruehauf Corp*., 274 NLRB 403, JD fn. 2 (1985).

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Overview of Events*

1. VAMCO's business, management, and plant

VAMCO is owned by several families of Pennington Gap. (3:754.) During the summer to early fall of 1991, the relevant time period, VAMCO's major customer was the Federal government. Nearly all of Company's business is with the General Services Administration (GSA). (3:754.) Under the GSA contract, VAMCO manufactures furniture (such as wall lockers, three-drawer chests, shelves, and similar items), for the military. (1:32.) For the 12 months ending about October 1991, the Company also, in support of Operation Desert Storm, fabricated some 135,000 ammunition boxes for the Government. (2:310; 4:935, 945–946, 956.)

Since the fall of 1990, Robert J. Parkey has been VAMCO's president and Charles Fugate has been its executive vice president. (3:753–754; 4:942.) Ken Hughes is the production manager, or was at the time (4:848, 851), Donald Patrick was the plant manager (4:847–848; G.C. Exh. 2), Daniel Hurd was the plant superintendent (4:894, 911), and there were several supervisors there during the summer-fall of 1991. Fugate testified that as of June 20 VAMCO employed 120 persons, with 110 of those being employed in production and maintenance classifications. (3:700, 756.) There were two shifts at the plant. (1:70.)

VAMCO's Pennington Gap facility sits at the end of Industrial Drive, a short road extending about .4 mile north of U.S. Highway 58, within the city limits of Pennington Gap. Although two lanes, wide enough for two cars to pass each other, Industrial Drive has no marked center line. Picketing during the strike occurred along part of Industrial Drive.

Situated on the left side of Industrial Drive, as one proceeds north from Highway 58 toward VAMCO, are some businesses. A bank sits at the corner of Highway 58 and Industrial Drive. After the bank is a motel, then Oakwood drive. (3:677.) Eventually on the left, or west side of Industrial Drive, is Morrell Motors. Beyond Morrell Motors on the right is the mental health facility of Lee County Health Department. Finally, where the road meets VAMCO's property, a sign is posted on the right side of the roadway. The sign alerts the public that state maintenance ends at that point.

A photocopy of an aerial photograph of the last half of the roadway, plus VAMCO's four buildings and parking lot, is in evidence as Joint Exhibit 1. (1:31.) Driveways are designated from A to E, the first four being at Morrell Motors and E marking the entrance to the mental health facility's parking lot. Industrial Drive is asphalt-paved. (3:684, 716; 5:1076.) The driveways of Morrell Motors are gravel and slope down to Industrial Drive. (3:802–803.) The parties agreed to a diagram (Jt. Exh. 4) reflecting measured distances between various points appearing in the aerial photograph. (5:979–981.) Industrial Drive measures 19 feet wide near point A. That appears to be its approximate width from there to the sign alerting the public about the end of state maintenance.

Joshua Carroll, a supervisor now but an assistant supervisor during the time of these events, testified that the photograph shows only about one half of Industrial Drive from

VAMCO south to Highway 58. That is, the photograph would have to be extended at the bottom, or southerly direction, for an equal distance of Industrial Drive shown in the photograph in order for that road to reach Highway 58. (3:660.)

As can be seen from the photograph, the Industrial Drive roadway that passes through VAMCO's premises separates the buildings, with building 1 and the parking lot being on the left (as one looks at the photograph) or west side, and buildings 2, 3, and 4 being on the right. The main office is located in building 1, and both Robert J. Parkey, VAMCO's president, and Charles Fugate, the executive vice president, have their offices there (4:941; 3:704) as does Ken Hughes (2:274–275). Daniel Hurd's office is in the production area of building 1. (4:895, 908.)

2. Events June 20 to September 4, 1991

a. *Strike begins June 20, 1991*

On Wednesday evening, June 19, 1991, several employees (apparently off duty and away from VAMCO's premises) gathered and developed a list of demands to present to VAMCO's management for the purpose of improving their wages and working conditions. (1:34.) Although the list is not in evidence, Bobby Duncan, one of the Charging Parties, testified that items were listed for the purpose of improving employees' pay rates and obtaining relief from certain work rules. (1:34.) Parkey, Respondent's president, testified that effective April 1 VAMCO, to comply with the new Federal minimum wage law, increased its starting hourly wage rate for unskilled workers to $4.25. (4:948, 964.) After just over a year at VAMCO as of June 20, Duncan's rate was $4.30 per hour. (1:31.) The other three Charging Parties had less service than Duncan.

About 6:45 a.m. the following day, June 20, Duncan, Jimmy Crusenberry, his brother Keith, and some eight or nine other employees gathered on VAMCO's parking lot before work. Most of the group, perhaps all, appear to have been workers from building 4. Deciding to seek the support of others before presenting their demands to management, the group went first to the breakroom of building 1 (two packing lines and wood shop), then to building 2 (welders), and finally to the south door (two paint lines) of building 4 before they departed to establish a picketing situs on Industrial Drive, generally between points E and D on Joint Exhibits 1 and 4, or about 150 feet or so from VAMCO's property.

This ''roundtrip,'' Duncan testified, consumed about 30 minutes. (1:59.) Along the way, the employees had conversations with Production Manager Ken Hughes and Plant Manager Donald Patrick, and I will address those conversations later when I cover the alleged independent violations of Section 8(a)(1). Although there is a dispute whether the protesters were told, as alleged, they would be terminated if they did not clock in and begin working, the General Counsel neither alleges nor contends that the strikers were terminated for this 30-minute episode. Indeed, at trial the General Counsel clearly stated that the Government was not contending the strikers were fired on June 20. (2:453.)

Approximately 20 or so when the picketing began the first day, the strikers' number shortly grew to about 40 or more. The strikers fashioned picket signs bearing legends reading ''Unfair Labor'' and ''On Strike.'' (1:41, 91.) During that first day Bernie Noe, VAMCO's tool and diemaker, a skilled specialist (1:43; 2:347; 4:937, 948, 965), came to the picket line about midmorning. Later I address the allegations that Noe came as VAMCO's agent and that VAMCO is responsible for statements Noe made there. At this point it suffices to note that Noe obtained a copy of the list of demands and reported to Parkey the group's desire to meet with him to discuss their demands. Noe returned to the line about noon and apparently sought to have one of the strikers return with him to discuss the demands with management. Birman testified that Noe appeared to be attempting to act as a mediator. (2:251.) J. Crusenberry testified that the strikers declined the invitation, telling Noe that they had decided to obtain union representation. (1:93.)

b. *Case 11–RC–5781*

Roger Tomlinson, a field representative for the Union, testified that, responding to a telephone call he received earlier that day from VAMCO employee Leonard Brewer, he went to the picket line the ''evening'' (apparently the late afternoon) of June 20. Tomlinson and about five strikers went to the nearby Hardee's parking lot where Tomlinson answered questions and gave the strikers about 100 authorization cards. The next day Tomlinson met with about 50 or so strikers, gathered at the picket site under a tarp tent for protection from the rain, where he received about 50 signed authorization cards. International Representative Sam Church also attended. (2:426–429, 442, 445.)

The following day, a Saturday, with many of VAMCO's employees present, Tomlinson gave strict instructions that there could be no violence, no guns, no alcohol, no threats, nor any intimidation. (2:429–430.) Church also told the group that the strike would have to be peaceful, and he repeated this at meetings on Saturday afternoons. (5:1077–1078.) In some cases unions distribute written instructions to strikers respecting picketing and other conduct. For example, see those in *Wayne Stead Cadillac*, 303 NLRB 432 (1991). There is no evidence that the Union distributed any written instructions to the strikers here.

The following Thursday, June 27, the Union filed its petition (Jt. Exh. 2) for representation election, docketed as Case 11–RC–5781. (2:422–423.) By letter (Jt. Exh. 3) dated August 6, Region 11's Regional Director, Willie L. Clark Jr., notified VAMCO's attorney, copies to the Union and its attorney (2:422–423):

> This is to advise you that the election scheduled for Friday, August 9, 1991, is indefinitely postponed pending disposition of unfair labor practice charges filed by you on behalf of the Employer alleging that the United Mine Workers of America, AFL–CIO violated Section 8(b)(1)(A) of the Act.
>
> Please remove the Notices of Election and replace them with copies of this letter.

c. *Strike ends; attempt to return August 12, 1991*

On Friday, August 9, the Union, on behalf of the strikers, made an unconditional offer for the strikers to return to work. (1:19–195; 2:267–268; 3:701, 734, 764.)

On Monday, August 12, the strikers reported for work and were directed to the breakroom at building 1 where Fugate,

VAMCO's executive vice president, told the group that Company's production could accommodate the return that morning of eight and the rest would be recalled as production was restored. Fugate concedes that much in cross-examination by the General Counsel (3:735), and in response to questions by the Union Fugate admits that as of August 12 he intended to recall everyone but later changed his mind. (3:809–810.) I cover this in more detail later when discussing the contention of the General Counsel and the Union that on this occasion VAMCO condoned any strike misconduct. Some of the strikers not recalled to work that August 12 returned to Industrial Drive where they began informational picketing until the Charging Parties were fired. (1:53–54, 100–101, 196.)

d. *Charging Parties fired September 4, 1991*

For the first week or two of the strike the local police of Pennington Gap stationed an officer across from the picket site throughout the presence of strikers. Thereafter, the city (or town) police were present at shift changes, the noon lunch period, and frequently during morning and afternoon breaks. Additionally, the city police of Pennington Gap and the Lee County Sheriff's department made unannounced random drivebys of the picket site. No arrests were made, and none of the strikers was even charged with any criminal law violation based on alleged strike misconduct.

Curtis Minton, Pennington Gap's police chief, testified that the strikers cooperated with any requests he made. (1:160.) Many nonstriking employees would stop and talk with the strikers or accept literature. Chief Minton occasionally heard the strikers call out ''scab'' or ''yellow dog'' at workers passing the picket line. (1:171–172.) Some of the Charging Parties concede that or testified similarly. Of course, such name calling falls well short of serious misconduct that forfeits reinstatement notwithstanding that VAMCO's employees did not appreciate being called such names.

''Scab,'' for example, has a long history of litigation. See cases such as *Boise Cascade Corp*., 300 NLRB 80 (1990), and *Caterpillar Tractor Co*., 113 NLRB 553 (1955), enf. denied 230 F.2d 357 (7th Cir. 1956). As the Seventh Circuit wrote, in denying enforcement, and quoting from one of its earlier decisions, ''Probably no words are more insulting to, or arouse keen resentment more promptly in, an employee than to call him 'a scab.''' 230 F.2d 357 at 359. The Board's view, however, prevails. *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). Even the more offensive ''Definition of a Scab,'' usually attributed to author Jack London,[5] generally is protected. See *Southwestern Bell Telephone Co*., 276 NLRB 1053 (1985), and *Letter Carriers v. Austin*, 418 U.S. 264 (1974). Thus, *VAMCO* does not rely on name calling as a basis for the discharge.

[5] It is unlikely that Jack London wrote ''Definition of a Scab.'' No citation lists any publication by London asserting authorship. The source of the rumor probably lies in the fact that London did write an intellectual discussion titled ''The Scab'' which was included in his book *War of the Classes* beginning at 101 (Macmillan 1905). That article was delivered first in 1904 as a lecture. 1 The *Letters of Jack London* 352–353 fn. 1 (E. Labor, R. Leitz, and I. Shepard, Stanford Univ. Press, 1988). Moreover, London died in 1916, and ''Definition of a Scab'' apparently does not appear until many years later.

During the course of the strike VAMCO obtained affidavits from employees describing alleged misconduct by the strikers. Although the record and VAMCO's posthearing brief (especially pages 3–4) contain more representations (that is, references to matters outside the record) than actual evidence on the matter, the record establishes that at some point VAMCO filed an 8(b)(1)(A) charge with Region 11 against the Union in Case 11–CB–2035. The filing date is not given in the record, but that charge apparently was filed around the end of July. The approximate filing date is obtained by working back 30 days from the date of August 30, discussed below. The General Counsel's field instructions for Regional Offices set a time target of 30 days to reach a Regional Office determination after a charge has been filed. Casehandling Manual Part One Sec. 10051 at A,2 (June 1989).

As already noted, shortly (apparently) after that charge was filed, the Regional Director, by letter dated August 6, notified the parties that he was indefinitely postponing the August 9 election pending disposition of the charge against the Union. Region 11 apparently completed its investigation of the charge in Case 11–CB–2035 and made its determination about August 30. On that date, Fugate testified, VAMCO's attorney (Gary W. Wright, its trial counsel) telephoned and notified him that, absent settlement, Region 11 had decided to issue a ''14-count'' complaint against the Union in the case. (3:703, 743–744, 787, 812–813.) Fugate testified that some 28 to 30 affidavits taken by VAMCO had been supplied to Region 11 in support of the charge in Case 11–CB–2035, with some of the affidavits describing more than one incident. (3:787, 794.)

Based on Attorney Wright's description of the specific dates of the 14 counts that would be alleged, as purportedly reported to Attorney Wright by Region 11 on August 30 (3:787, 812–813), Fugate, after consultation with Attorney Wright and with Robert Parkey, Ken Hughes, and Donald Patrick (3:743, 816), in the first week of September (Tr. 3:702), made the final decision (3:702, 740, 742–743, 788–789, 826), while in a telephone discussion with the attorney (3:793), to discharge Charging Parties Duncan, Birman, Crusenberry, and Woodard for strike misconduct. The decision, Fugate testified, was based primarily, even entirely, on misconduct described in the 28–30 affidavits (only some of which pertained to the four Charging Parties, 3:748, 795) supplied to Region 11, as reinforced by the decision of Region 11 to issue a complaint. (3:703, 743–748, 797, 819, 828, 837.)

Responding to VAMCO's December 17 request under the Freedom of Information Act (FOIA), Regional Director Clark, by letter (R. Exh. 3) dated December 30, disclosed as follows. In Case 11–CB–2035 Region 11 made its determination and advised the parties on August 30. Moreover, description of the incidents found meritorious, the dates, and names of the individuals involved would not be disclosed under FOIA exemptions. Finally, if a settlement had not been obtained, the following allegations (13 dates, not 14) would have been set forth in a complaint and notice of hearing. First, the complaint would have included a paragraph alleging that commencing about June 20 the Union established and maintained picket lines at VAMCO's plant and, in the presence of employees, threatened nonstriking employees, su-

pervisors, and agents with physical violence on the six dates of June 26, July 12, 20, 22, and 29, and August 5.

Second, the complaint would have contained a paragraph alleging that beginning about ''July'' (June) 20 the Union, which maintained a picket line at the plant, on the four dates of July 11, 29, 30, and August 1, and in the presence of employees, ''threatened to damage the property of persons doing business with the Employer and of non-striking employees.''

Third, the complaint would have alleged that about June 20 the Union, which maintained a picket line at the plant, ''attempted, in the presence of employees, to cause damages to the property of nonstriking employees and persons doing business with the Employer,'' on the three dates of July 19, and 27 and August 2.

Fugate testified that no itemized list of specific misconduct incidents, on which the discharge decision was based, was prepared for each of the Charging Parties. (3:800.) At trial Fugate relied on his memory from earlier (1991, it seems) readings of the 28 to 30 affidavits, and, when that memory was exhausted, from his refreshed memory (refreshed from inspecting affidavits on the witness stand, over the repeated objections of the General Counsel and the Union, 3:820–823, 831, 833), to describe specific incidents on which he relied in deciding to fire former strikers Duncan, Birman, Crusenberry, and Woodard. Later I address the misconduct allegations.

Over the signature of Plant Manager Don Patrick, VAMCO, by letters (G.C. Exhs. 2, 3, 4, and 5) dated September 4, notified Charging Parties Duncan, Birman, Crusenberry, and Woodard:

> This letter is to inform you that, effective September 4, 1991, your employment with VAMCO is terminated as a result of your misconduct related to the work stoppage which began on June 20, 1991.

At no point before the trial, neither in the discharge letters nor later, did VAMCO advise the Charging Parties of any of the specifics of the misconduct alleged against them.

B. *Alleged 8(a)(1) Violations*

1. Bernie Noe—June 20, 1991

a. *Allegations*

The complaint alleges (par. 6; denied) that Bernie Noe, a tool and die maker, was VAMCO's statutory agent, and that VAMCO violated Section 8(a)(1) of the Act on June 20 when Noe (par. 7a, denied), told employees that it was ''futile for them to cease work concertedly and engage in a strike,'' and (par. 7b, denied), threatened employees ''with discharge if they continued to engage in a strike.'' Because I find that the evidence falls short of establishing that Noe, who did not testify, was VAMCO's statutory agent, I do not reach the merits of the allegations. (Were I to reach the merits, I generally would credit the evidence concerning his statements.)

b. *Discussion*

There is no evidence that on this occasion VAMCO sent Noe to speak to the strikers. Parkey testified that Noe came to him volunteering to, in effect, mediate. (4:939–940, 951–952, 961, 970.) No evidence contradicts this. The General Counsel cites testimony that Noe told the employees the Union could not help him because he is ''management.'' (Br. at 29.) Statements of an alleged agent, however, do not constitute evidence of agency status.

The only point which raises a question is the fact that Noe attends information meetings which Parkey holds about every other Wednesday (Parkey testified ''bimonthly'' but the context suggests he means semimonthly, 4:952, 954) with individuals from different departments. Parkey's purpose is to update attendees on the status of orders and to dispel rumors. There is no evidence that Noe (who works directly under Patrick, the plant manager) is expected to, or does, convey this information to other employees. Indeed, as Noe is the only employee assigned, at least regularly, to the tool and die area, he normally works alone. Noe attends apparently by virtue of his key position at the plant and also, perhaps, to lessen any feeling of isolation he might have.

In any event, as the evidence falls short of demonstrating that Noe in the past conveys messages to employees from management, or that VAMCO has placed Noe in the position where employees could reasonably believe that he speaks for management, I shall dismiss complaint paragraphs 7(a) and 7(b).

2. Daniel Hurd—June 20, 1991

a. *Allegation*

Complaint paragraph 7(c) alleges that on June 20 Supervisor Daniel Hurd (spelling corrected, 4:931–932) threatened employees ''with disciplinary action if they continued to engage in a strike.'' Respondent denies. I find merit to the allegation.

b. *Early morning—Tim Jones*

(1) Facts

Tim Jones works on packing line 1 in building 1 under Jeff Barber, a supervisor who reports to Daniel Hurd, the plant superintendent. (2:324–325.) Instead of joining the group protesting wage rates and working conditions when it came to the breakroom in building 1 the morning of June 20, Jones reported for work at packing line 1 after having clocked in. As he and the other 10 to 12 packers stood there waiting for Jeff Barber, their supervisor, to come make work assignments, Plant Superintendent Hurd came by and told them to ''get to work,'' that if they ''don't [get to] work in 3 minutes, hit the time clock.'' About that time Barber came up and assigned Jones and the other to packing line 2. (2:325, 328, 333–334.) Although Jones had never heard ''hit the clock'' phrase at VAMCO, he testified that he understands it to mean the person is fired. (2:328–329.)

That morning, Hurd testified, he observed that several employees, after the 7 a.m. shift had begun, walking around outside and standing around inside. Ken Hughes had come to Hurd's office and told him there was a work stoppage and for him to see that his employees were at work. (4:900, 911, 921.) Approaching the packing lines, he discovered some employees working and some simply standing there not working. He ''politely'' asked them to get to work or to

leave the property. He denies threatening to terminate any of those at the packing lines. (4:895, 897, 902, 915, 929.)

Hurd explains that company policy (possibly related to Federal wage-hour regulations) requires employees to be clocked in during the shift if they are in a work area. Hurd did not check to see whether the employees were clocked in, and he did not know if any of these employees were participating in any walkout. He did not ask why they were not working because normally everyone starts working at 7 a.m. On occasions when someone is not working he asks him to get back to work, but he normally does not ask the person to leave. (4:911–912, 915–916.)

Employed for nearly 17 years at VAMCO (4:907–908), Hurd asserts that at VAMCO he has never heard the phrase ''hit the clock'' and has never said that to anyone. (4:917.) He has told employees to punch the time clock and to leave VAMCO's premises, but this is when he is terminating an employee and he tells the person he is terminated. (4:903, 916, 929.) Employed at VAMCO for 3 years as of the hearing, Plant Manager Donald Patrick asserts that he has heard employees use the phrase ''hit the clock'' but that management, which does not use it, instead tells employees to ''clock out'' and return the next day to discuss matters. (4:872.)

(2) Discussion

Respecting this largely undisputed incident, I find that it does not support complaint paragraph 7(c). Jones's version is ambiguous as to the consequences, and he in effect concedes that his understanding of the meaning is merely subjective. But even if Hurd's direction to get to work or, in 3 minutes, hit the timeclock should be interpreted as a threat of discharge, there is no violation because Hurd was not aware of any concerted, protected activity. To the extent that paragraph 7(c) depends on this incident, I shall dismiss the allegation.

c. *Early morning—Steven Birman*

(1) Facts

Steven Birman, one of the charging parties, worked in Building 1 as a packer under the supervision of Richard Hilton who, as Jeff Barber, reports to Daniel Hurd. (2:239–240, 274.) After clocking in, as usual, about 20 minutes before the 7 a.m. start of the day shift, Birman went to the breakroom. Several building 4 employees, including Bobby Duncan and Jim Crusenberry, then arrived from building 4 and began discussing the demands they planned to present to management. At the buzzer for the 7 a.m. shift Birman, and apparently the other building 1 employees, began walking toward their work stations. (2:244–245.)

Although Birman makes no reference to the presence of Ken Hughes, Duncan (1:35) and Crusenberry (1:88–89) assert that, while they were discussing the demands with the building 1 employees, Hughes passed through the breakroom on his way to another part of the building. It is not clear whether Hughes understood, or even heard, what the employees were discussing.

Birman was undecided as he walked toward his work station. Passing one of the packing lines, and about halfway to his work station, Birman met Hurd who asked him if he was going to work. ''I guess not,'' Birman answered. ''Not you, Steve, you're not in with this.'' (2:246.) Birman's testimony is unclear at that point. He seems to suggest that the two parted before the next exchange.

In any event, as Birman was preparing to leave he stopped (whether at Hurd's office or elsewhere is unclear) to tell Hurd why he was walking out. To Birman's question of whether he had heard any of the demands or complaints of the group, Hurd answered no. When Birman sought to describe some, Hurd gave a ''cold shoulder'' shrug. As Birman then turned to leave, Hurd grabbed his arm and, turning Birman around said, ''Steve, it's your job.'' When Birman pulled away, Hurd said he would like for Birman to leave VAMCO property. Birman left the building and joined the group as it was walking from building 2 to the side of building 4 by the paint line. (2:246–247.) Hurd does not address Birman's testimony, and VAMCO likewise fails to cover it on brief. The General Counsel argues (Br. at 26) that Hurd's ''It's your job'' is a threat that VAMCO would fire Birman if he joined the employees in protesting their working conditions.

(2) *Discussion*

I would agree with the General Counsel if the evidence established that Hurd was aware that the group walkout was directed at improving wages, hours, or working conditions. All we know is that Hurd was unaware of the nature of the employees' ''demands'' or ''complaints'' and that he declined to listen to any explanation. Such complaints could have been about matters unprotected by the statute. In the absence of a threshold showing that Hurd was aware the group protest pertaining to wages, hours, or working conditions, I find that this incident does not support complaint paragraph 7(c).

d. *End of shift—Tim Jones*

(1) Facts

About 2 minutes before the 3:30 p.m. end of that June 20 shift, Tim Jones testified, Hurd came and addressed the 10 to 12 employees working at packing line 2. Hurd told them that anyone not reporting for work the next day would receive an ''unexcused'' absence. Such an absence, Jones explains, results in ''a write-up and after three write-ups you're fired.'' Writeups, Jones acknowledges, are served on an employee by the supervisor. (2:325–326, 330.) Hurd confirms the disciplinary consequence, although he states that it is the fourth unexcused absence that results in termination. (4:902, 916.)

Jones did not report for work the following day, Friday, June 21, and he joined the strike the following Monday. (2:329–330.) Jones concedes that after he returned from the strike he has received no written warning for an unexcused absence during the strike, and he knows of no striker who did. (2:331.) He would not know, however, if his attendance record or that of any other striker had been marked as ''unexcused'' for June 21 or any other day of the strike. (2:334–335.)

Hurd confirms that unexcused absences will result in termination, but he places the termination as occurring after the fourth unexcused absence. (4:902, 916.) When Hurd approached the line about 7:15 to 7:20 a.m. that day to get people working, employees James Calton and Jason Colwen

(4:895–896, 901, 912, 918, 923) asked him what would happen if they did not cross a picket line and report for work the next day. According to Hurd, he explained to them that the normal policy was that if the job was available and there was no legitimate excuse then the absence would be considered unexcused, but that he did not know how the situation would be handled. (4:896, 902, 918, 921.) He testified that under the circumstances of events he did not know what VAMCO would do. (4:907, 919.) Hurd generally denies addressing the packers at the end of the day about absences the following day. (4:897–898) Hurd testified that no striker was disciplined for absenteeism or unexcused absences. (4:899.)

VAMCO's absentee calendars for Charging Parties Duncan (G.C. Exh. 16), Crusenberry (G.C. Exh. 9), Birman (G.C. Exh. 10), and Woodard (G.C. Exh. 15) reveal that the records for the four were marked ''unexcused'' from June 20 through August 23 (except for the July 4 plant vacation) with most entries including the phrase, ''on line.'' No calendar was offered for Tim Jones, James Calton, or Jason Colwen.

Charles Fugate, the executive vice president, testified that VAMCO treated time on the picket line as an excused absence (3:736), that the ''unexcused'' is shown as a ''catch all'' phrase when the clerk is uncertain how to classify the absence, and that ''on line,'' which means the picket line, is an explanatory reference. (3:740, 811.) Fugate testified that the ''unexcused'' in no way figured in the terminations of the four, and he assumes that the records of all those absent during the strike show the same ''catch all'' designation. (3:810–811.)

(2) *Discussion*

Crediting Tim Jones rather than Daniel Hurd, I find that VAMCO, as alleged, threatened employees with disciplinary action, thereby violating Section 8(a)(1). By shift's end VAMCO, and Hurd by extension, was well aware of the protected nature of the strike. There is no dispute that under VAMCO's rules an unexcused absence is one step in the disciplinary process which eventual, after three or possibly four such absences, results in discharge. Hurd, in addressing the employees at shift's end, offered no explanation that they would not be charged with an unexcused absence for participating in a protected strike.

As Hurd's conversation with Calton and Colwen would, even if violative, be cumulative, I need not treat that conversation. To the extent that Hurd's version is offered to show that he would not have made the unqualified statement Tim Jones attributes to him, I find that he remarked as Jones testified. Thus, in view of my finding respecting Hurd's end-of-shift warning to the packers, I find merit to complaint paragraph 7(c).

3. Donald Patrick—June 20, 1991

a. *Allegation and introduction*

Complaint paragraph 7(d) alleges that on June 20 Donald Patrick, the plant manager, threatened employees ''with termination because they ceased work concertedly and engaged in a strike.'' Respondent denies.

Although there is no similar allegation naming Ken Hughes, the production manager, testimony was elicited, without objection, to comments by Hughes similar to those attributed to Patrick. The General Counsel moved to amend the complaint to add Hughes to paragraph 7(d) in conformity with the evidence. Eventually I denied the motion for the purpose (unsuccessful) of avoiding an extension of the hearing into a second week. Nevertheless, I made clear that the evidence as to Hughes, while not available to establish an unfair labor practice, would be considered for any animus his comments might reflect. (1:223–231; 2:254–255.)

b. *Ken Hughes*

(1) Facts

Three of the four Charging Parties and former striker Geoffrey Lewis testified concerning this allegation. Ken Hughes did not testify. Bobby Duncan testified that while the protest group was in building 2, Ken Hughes and Jeff Cox (a building 4 supervisor) arrived and Hughes told Duncan and the others of the group that they had ''3 minutes to hit the clock or we was terminated. To get off the property.'' The group left there and went to the south door of building 4 to solicit support from the painters. (1:37.) (Charging Party Birman, recall, did not join the group until it had left building 2. 2:247.)

Jimmy Crusenberry quotes Hughes as telling the protesters that they had 3 minutes to get to work or they would be terminated and to get off the property. (1:90, 107–108). In his second pretrial affidavit, dated October 23, Crusenberry quotes Hughes as telling the group of protesters (R. Exh. 5; 1:105, 107–108): '' There's work to be done. You have three minutes to clock in and get to work or get off Company property.''

At the trial Crusenberry was unable to explain why his October 23 pretrial version omits the phrase about termination, but Crusenberry assures that he has no doubt the word was spoken on June 20. (1:122.) He denies that the ''termination'' came from his own conclusion that he was terminated when the group was told it had 3 minutes to clock in or to get off the property. (1:123.)

Randy Woodard testified that Hughes told the protesters that there was work to be done and that they had so many minutes to get off the premises or to clock in. ''I can't, don't know exactly how he put it, but he said we would be terminated if we left the premises.'' (1:185.) Woodard admits (1:208) that the pretrial affidavit erroneously places the comments of Hughes in the building 1 breakroom, and he concedes (1:209) that his recollection about this is not ''on the tip of my mind.''

Geoffrey Lewis, a brake press operator in the crew working for Jeff Cox in building 4, was one of the protesters who had assembled in the parking lot before the 7 a.m. shift. (2:338–339). Lewis testified that when Hughes came into building 2 he gave the protesters an ultimatum (2:341): ''There is work available for everyone. You have 3 minutes to punch the time clock or vacate the premises.''

(2) Discussion

The testimonial quote of Geoffrey Lewis, mirrored in Crusenberry's second pretrial affidavit, having a more natural word order, and Duncan, Crusenberry, and Woodard being unpersuasive as to Hughes, I find that Hughes, speaking as Lewis describes, made no reference to ''termination.''

c. *Donald Patrick*

(1) Facts

Donald Patrick testified that on June 20 he arrived late, a few minutes after 7 a.m., and observed a group of 10–20 employees walking toward the back of building 4. Patrick met Ken Hughes who informed him the group wanted to talk about wages and other matters, that he had told them he would not talk to them as a group, and that he had told them to leave or clock in but that they would not clock in. Patrick entered building 4 and proceeded to the south door where he met the strikers and asked them what was going on. (4:848–850, 853–854.)

After several of the group mentioned some of their demands, and Patrick's saying he would talk with them individually if they returned, but would not talk with them as a group, Patrick (4:850, 869–871) told them to clock in and go to work or leave the premises or, as with the Ken Hughes issue, he additionally may have gold them that they were terminated. Duncan cites the terminated language (1:38, 76), but omits it during cross-examination (1:61, 83–84.) Crusenberry (1:91, 109) includes the ''terminated'' but, as earlier noted respecting Hughes, omitted (1:109–110) it from his second pretrial affidavit and has no explanation for doing so. (1:122.)

At the trial Randy Woodard initially (1:186–187) and a second time (1:200) omits the ''terminated,'' then recalls that ''one of them'' (Patrick or Hughes) added that ''you will be terminated.'' ''I don't know how they phrased that. I can't—they phrased it in a way, but I took it that we was fired.'' It was Patrick, Woodard then testified, who said it. Now recalling exactly, Woodard testified that Patrick said that they had ''3 minutes to clock in or get off the property, that we would be terminated.'' (1:202.) As noted earlier, Woodard concedes (1:209) that his recollection on this does not flash from his memory with the brilliance and focus of a laser beam. On redirect examination by the Union, and after being further refreshed by his third pretrial affidavit, Woodard confirms (1:217–218) that Patrick told the protesters to clock in and if they did not they had ''3 minutes to get off the property, that we were fired.''

Geoffrey Lewis describes the incident as concluding with Patrick's saying ''basically the same thing that Mr. Hughes had said up in the other building.'' Asked what that was, Lewis testified, ''That we had 3 minutes to clock in or vacate the premises.'' (2:343.)

Patrick denies telling the strikers that they were terminated. (4:850–851, 879–880.) Patrick acknowledges that later some employees asked him whether the strikers had been fired and that he said he did not know. (4:864–865.) Patrick's expansion of that in the next answers rambles, ranging from a definite ''I knew that they were not fired'' to several mushy options such as not knowing if they could be fired, did not think they could be, it was out of his hands, he would shrug his shoulders, and ''I would say I don't know what's going to happen.'' The first and last of these, I find, is what he responded when asked by employees. That is, he told them he did not know and did not know what was going to happen. (4:865.)

(2) Discussion

As with the Ken Hughes question, the wording offered by most of the General Counsel's witnesses seems less natural than that given by striker Geoffrey Lewis (as mirrored by Crusenberry's pretrial version), Woodard's initial trial version, plus Plant Manager Patrick's account. Accepting that, and Patrick's denial that he told the employees they were terminated, I shall dismiss complaint paragraph 7(d).

4. Thomas Pennington—June 2, 1991

a. *Allegation and facts*

Complaint paragraph 7(e) alleges that on June 23, at VAMCO's Pennington Gap facility, Thomas Pennington, a supervisor, threatened ''employees with plant closure if they engaged in union activities.'' Respondent denies.

Jimmy Crusenberry and Union Representative Roger Tomlinson testified in support of this allegation. Thomas Pennington, who testified in opposition, supervises the wood machinery department in building 1. (4:889–890.) There is no dispute that on June 23 Crusenberry, Tomlinson, and several of VAMCO's employees, including Anthony von Von Burgin, were standing or sitting outside the St. Charles, Virginia railroad station (contrary to the situs alleged), a local gathering spot about 7 miles from VAMCO's plant (4:883), when Pennington drove up.

Actually, the manner of Pennington's appearance is disputed. According to Crusenberry, Pennington just approached, and not in response to anyone in the group hollering for him to stop as he drove by. (1:96, 110–111.) Crusenberry suggests that Pennington first began a conversation with Tomlinson and that he paid little attention until he heard the Union mentioned. (1:111–112.) That is when he heard Pennington say, ''If you form a union, or try to, we'll shut the doors; there will be no union in VAMCO'' (1:96) or (1:111) ''If you try to put a union in, VAMCO will shut the doors.''

According to Tomlinson, Pennington drove by, made a U-turn, and came back to the group. One of the employees said hello, but Pennington, who appeared to be in a bad mood, asked what they were doing. One of the employees said they were discussing the organizing campaign and the strike. Pennington then said, ''We'll shut the plant down if a union is voted in.'' (2:432, 450–451.) The conversation quickly ended and, Tomlinson testified, the employee group left Pennington. (2:451.) Other than Anthony Von Burgin, none of the other employees there on the occasion was called by the General Counsel, and Von Burgin, although called as a witness about another allegation, was not asked about this incident. (Counsel for the General Counsel, at 2:305, did ask Von Burgin what occurred on June 23, but when Von Burgin could not answer (recorded as ''No audible response''), counsel withdrew her question.)

Pennington, who lives in St. Charles, testified that the group hollered and flagged him down as he passed by, that he turned back and even as he was getting out of his vehicle Tomlinson and Keith Crusenberry approached him and began asking him to join the strike. Pennington replied that he could not. Tomlinson said VAMCO was making millions of dollars and that some of the owners had cleared $150,000 the previous year. Pennington said he doubted that, because he

sees what comes in and goes out, but if they had proof VAMCO was making millions then he would consider walking himself. Tomlinson said union companies in sheet metal were paying $8 to $10 an hour.

Pennington said he was a supervisor and probably could not vote anyway. Tomlinson (who did most of the talking rather than Keith Crusenberry or any other employee) said that even if Pennington could not vote he could talk to his employees. ''No,'' Pennington replied, he could not do that either because if he had a vote he would vote for VAMCO. ''In my opinion,'' Pennington offered, ''if the Union does come in, they [VAMCO] would shut the doors,'' adding that the Company had said nothing about it to him. Tomlinson stated that all companies say that, but VAMCO could not shut the doors because it had government contracts to fulfill. Pennington answered, ''Yes they could.'' Pennington repeated that he could not vote in any event, and the conversation ended with everyone leaving. (4:883–892.) Pennington denies that anyone in management has ever told him VAMCO would shut down nor even told him what the Company's position would be on this. (4:892.)

b. *Discussion*

Testifying with far more details than the Government's witnesses, Pennington gave a version which sounds natural and persuasive. In crediting Pennington over J. Crusenberry and Roger Tomlinson, I have considered the fact, as stipulated by the parties (4:891–892; 5:982–984 and 1094–1095), that within the last 10 years Pennington sustained a felony conviction.

VAMCO argues (Br. at 87) that Pennington's expression of opinion, made to the Union's representative in the presence of open and strongly committed (strikers) supporters of the Union, was not violative of the Act. VAMCO concedes that in different settings the statement could be considered an unlawful threat, but here the expression, VAMCO observes, was an isolated incident, spoken in a debate with the Union's field representative, away from the plant, in a conversation initiated by the Union's representative and another employee and in which Pennington made clear that he was speaking only for himself. The General Counsel argues (Br. at 29) that VAMCO is responsible for Pennington's statement because the employees, aware of Pennington's supervisory status, had just cause to believe he was acting on VAMCO's behalf.

In the usual case plant closing predictions or threats are made by employer officials in captive audience meetings, or at least in the management/worker context in a plant setting, and frequently are part of a pattern of such conduct. Here, none of the usual circumstances prevailed. Outnumbered about 5 to 1 by open and strong supporters of the Union, plus the Union's organizer, Pennington's expression of opinion was given in the context of, in effect, a debate with the Union's organizer in which Pennington clearly states that his expression was his own opinion. In the unusual circumstances of this incident, I find that Supervisor Thomas Pennington's expression of opinion would not reasonably have tended to threaten or coerce employees who may have overheard his statement. Accordingly, I shall dismiss complaint paragraph 7(e).

5. Robert J. Parkey—August 26, 1991

a. *Allegations and facts*

Two paragraphs of the complaint allege that Robert J. Parkey, VAMCO's president, threatened employees on August 26 because of their union activities. Paragraph 7(f) alleges a threat of ''unspecified reprisals'' and paragraph 7(g) alleges a threat of discharge. Respondent denies. Striker Anthony Von Burgin testified in support, and Parkey testified in opposition.

Employed at VAMCO since December 4, 1990 (2:288, 306), Von Burgin joined the picket line the first day and he thereafter served on the picket line every day of the strike. (2:292, 295.) He was elected and served as a spokesperson for the strikers with the media. He was interviewed by reporters from television and newspapers and his statements were reported. (2:310–311.) In response to a letter recalling him after the strike, Von Burgin returned to work on August 19. (2:302, 308.) He was among the first half of the strikers recalled. (2:312.)

Before the strike Von Burgin worked the second shift. (2:289, 322.) After his recall, Von Burgin was assigned to the day shift welding ammunition boxes in building 4. (2:302, 305, 309.) On Monday, August 26, a week after his return to work, Von Burgin was at his station welding, when, both agree, Parkey approached and engaged Von Burgin in conversation. (2:303; 4:934.) Both witnesses also agree that, because of the noise in the area (an employee near Von Burgin was operating a grinder) they stepped outside for most of their conversation. Their versions differ about the content.

Before summarizing the versions, I note Parkey's testimony that he tries to walk through the plant at least once a day and talk to employees about work and families. (4:941–942.) Although Parkey balks at saying he has made a special effort to do so since the strike, he acknowledges that he has spoken with as many of the returned strikers as he could. (4:943.) This is the first occasion Parkey ever stopped to speak with Von Burgin (2:320); but, before the strike Von Burgin worked the second shift ''back in a small corner.'' (2:322.) On most of Parkey's visits after the strike, Von Burgin asserts, Parkey stands and watches employees, speaking only with certain ones. (2:322.)

Parkey specifically remembers Von Burgin from the days of picketing because, Parkey testified without contradiction, Von Burgin displayed aggressive hostility by yelling obscenities and gesturing at him the majority of times that Parkey passed the pickets. This did not upset him, Parkey asserts, but he was shocked by the hostility of the strikers because he could not understand what had precipitated the passion which they displayed. (4:943, 957, 959–960.)

Von Burgin testified that Parkey ''came over talking about the Union. He didn't understand why we'd walked out. He made a statement saying that as soon as his [ammunition box] contract is up that I would be gotten rid of. That I would never work in this county again.'' At that point they stepped outside because ''We was practically hollering because of the noise'' (2:303–304, 309), although later he asserts that it was Parkey who had trouble hearing. (2:318.)

Once outside Parkey began asking about any problems with VAMCO, and Von Burgin asked about a safety committee, gloves, pay rates, and about his own possible pay

raise. Parkey suggested that they arrange a date for Von Burgin to talk ''one on one'' after work in Parkey's office. Von Burgin said that would be ''no problem.'' (2:304, 317–319.) Although such a meeting was scheduled, Von Burgin had to cancel and no second meeting was ever scheduled. (2:319.) Von Burgin concedes that after the ammunition contract was completed in October, to his surprise, he was transferred to the sheet metal department, that, although some employees went to the second shift, no one was laid off when the ammo box contract was completed, and that he currently is employed on the day shift as a packer in building 1. (2:288, 310.) Parkey confirms this testimony of no layoffs and that Von Burgin remains employed. (4:935, 956.) Parkey denies the threats Von Burgin attributes to him. (4:936, 937.)

Parkey suggests that the conversation moved almost immediately from Von Burgin's work station to the spot outside where the conversation ''got started'' by Parkey asking how he was doing and other small talk. Von Burgin said he had heard he would be laid off when the ammo box contract was completed. Parkey said there are rumors, just as in the military, that there was a backlog of work because of the strike, and he believed that at completion of the ammo box contract the employees working on it would be absorbed into other areas of the facility. Von Burgin expressed other concerns and Parkey suggested that they meet later at a convenient time to discuss those concerns and (4:936) ''why they'd submitted to the employees.'' (4:935–936, 946–947, 955–956.)

Parkey acknowledges that he had seen the list of grievances, which had been submitted to him on June 20, and that he thus was familiar, on August 26, with the complaints employees had. (4:962.) Parkey viewed this occasion with Von Burgin as an opportunity to bridge possible hard feelings, and because of that he suggested that they talk more later. (4:955.) Parkey concedes that he does not think the employees chose the right way to air their grievances, and he admits telling Von Burgin that there is a right way and a wrong way to do things and that he thought the employees had chosen the wrong way to be heard. (4:944.)

Although he did not tell Von Burgin the employees had no reason to walk out, Parkey thinks they should not have done so without first attempting ''some communication.'' After having seen the list of demands, Parkey asserts ''it's very true I do not think they had a valid reason to go out.'' Most of the strikers had not been there long, some a month, 2 weeks, even 2 days. ''So, no, I don't believe that they had a right to go out there.'' (4:944, 962–963.)

b. *Discussion*

Despite the differences in the versions, two matters are clear. First, Parkey had a possible personal motive for the threats Von Burgin attributes to him, for during most days of the strike Von Burgin, with accompanying gestures, had yelled obscenities at Parkey as he passed the pickets. Presumably the gestures, in keeping with the obscenities, were likewise obscene. Offsetting this, at least to some degree, are the admitted facts that Parkey (1) offered to meet with Von Burgin to discuss his concerns and, apparently, to obtain a better understanding of the concerns of employees generally, and (2) neither Von Burgin nor anyone else was laid off when the ammo box contract was completed.

Of course, the mirror image of Parkey's possible personal motive is Von Burgin's possible personal animus (obscenities, gestures) against Parkey. If Parkey's possible motive would lead him to threaten Von Burgin, would Von Burgin's personal animosity toward Parkey prompt him to lie about Parkey? Consideration of that possibility must take into account that any current employee of a respondent employer ordinarily, from self interest, would be reluctant to testify falsely against his employer.

Aside from Von Burgin's possible motive of personal animus, the second clear fact is the lack of logic in Von Burgin's account. According to Von Burgin, Parkey, at Von Burgin's work station, began by expressing his lack of understanding why the employees had walked out and then, hollering over the noise for all the world to hear, threatened to lay Von Burgin off at the end of the ammo box contract and to blacklist him everywhere in the county. If Parkey had made these threats, why would he then suggest stepping outside for a quiet conversation, a conversation in which he consulted Von Burgin about any problems at VAMCO, listened to Von Burgin list some concerns, including Von Burgin's own pay, and then suggest that the two of them meet at a convenient time to continue their discussion?

Von Burgin's account lacks plausibility, and I do not believe him. Except for the threats, and some of the sequence, most of what Von Burgin describes fits well into Parkey's description. Parkey's account is plausible, and I find that he did not succumb to any temptation, which could have emanated from a possible personal resentment at Von Burgin, to threaten Von Burgin. Accordingly, I shall dismiss complaint paragraphs 7(f) and (g).

C. *The Discharges for Alleged Strike Misconduct*

1. Governing law

In all cases involving either the discharge of or refusal to reinstate strikers for having engaged in alleged acts of strike misconduct, ''the burden of proving discrimination is that of the General Counsel.'' *Rubin Bros. Footwear*, 99 NLRB 610, 611 (1952). But action taken against participants of a protected strike is inherently destructive of Section 7 rights. *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). Accordingly, the General Counsel's threshold burden is to establish (1) that a worker was, in fact, a striker and (2) that his employer took some action against him for conduct associated with the strike. *Laredo Coca Cola Bottling Co*., 258 NLRB 491, 496 (1981).

The General Counsel discharges the Government's two-factor threshold burden (establishes a prima facie case) by demonstrating (frequently by stipulation and then resting) the following: (1) that a discharged, or unreinstated, employee had been a striker and (2) that the employer had discharged, or failed to reinstate, the worker on the basis the employee had engaged in strike misconduct. *General Telephone Co*., 251 NLRB 737, 739 fn. 18 (1980), enfd. mem. 672 F.2d 895 (D.C. Cir. 1981) (General Counsel obtained stipulation of threshold facts for prima facie case and then rested, held sufficient).

When the General Counsel has established the Government's prima facie case, the burden shifts to the respondent employer to show it had an *honest belief* that the employee disciplined was guilty of strike misconduct of a serious nature. *NLRB v. Champ Corp*., 933 F.2d 688, 700 (9th Cir. 1991); *Gem Urethane Corp*., 284 NLRB 1349, 1352 (1987);

General Telephone, supra at 738. Serious misconduct which disqualifies a striker from reinstatement, or permits his discharge, is that which meets the test adopted by the Board in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984):

> [W]hether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.

And misconduct aimed at managers or other nonemployees may also be grounds for denying reinstatement. *General Chemical Corp*., 290 NLRB 76, 82 (1988); *Aztec Bus Lines*, 289 NLRB 1021, 1027 (1988); *Clear Pine Mouldings*, supra at 1046 fn. 14, 1048. However, it is not clear from the cases whether misconduct against someone such as a manager or other nonemployee must occur in the presence of employees to be available as a basis for disqualification, whether employee presence is satisfied from the presence of the accused striker, or whether it is assumed that knowledge of the event will be disseminated among employees. Clearly a lone striker cannot escape discipline simply because no other employee observes him club a manager or firebomb the employer's plant (where a security camera captures the misconduct on videotape).

The employer's honest belief burden is not satisfied by generalities, and meeting that burden ''requires some specificity in the record, linking particular employees to particular allegations of misconduct.'' *General Telephone*, supra at 739. The employer ''must produce evidence connecting the discharged employees to specific misconduct.'' *Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 257 (6th Cir. 1990). However, the employer's burden does not extend to proving that the striker did engage in the misconduct, nor does it require that the linkage be concrete or conclusive. *Axelson*, 285 NLRB 862, 864 (1987). Moreover, the employer's honest belief may be based on reports from its security guards or on written reports from others. *Clougherty Packing Co*., 292 NLRB 1139, 1142 (1989). *General Telephone*, supra at 739.

Once the employer demonstrates its honest belief, the burden shifts back to the General Counsel to prove the discharged striker's innocence. *Champ Corp*., 291 NLRB 803, 806 (1988), enfd. 933 F.2d 688, 700 (9th Cir. 1991); *Laredo Coca Cola Bottling Co*., supra at 496; *Rubin Bros. Footwear*, supra at 611. The employer then may offer evidence rebutting the Government's innocence evidence. *Laredo Coca Cola*; *Rubin Bros. Footwear*. If the General Counsel does not adduce a preponderance of the credible evidence, the Government loses because at all times it has the overall burden of proving discrimination. *Champ Corp*., supra at 806, 807 fn. 13; *Axelson*, supra at 864; *Gem Urethane*, supra at 1352; *Rubin Bros. Footwear*, id. If it is found that the striker did not engage in the misconduct alleged, he or she may not lawfully be discharged regardless of the employer's good faith. *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964); *NLRB v. Champ Corp*., 933 F.2d 688, 700 (9th Cir. 1991).

Even if the General Counsel fails to prove the discharged striker innocent of the misconduct relied on, in good faith, by the employer, the Government still may prevail if the General Counsel demonstrates that the employer applied a double standard to employees respecting incidents of misconduct. That is, the employer ''may not knowingly tolerate behavior by nonstrikers or replacements that is at least as serious as, or more serious than, conduct of strikers that the employer is relying on to deny reinstatement to jobs.'' *Chesapeake Plywood*, 294 NLRB 201, 204 (1989), modified 917 F.2d 22 (4th Cir. 1990); *Champ Corp*., supra at 806; *Aztec Bus*, supra at 1027. In our case the General Counsel does not contend that VAMCO treated strikers and nonstrikers disparately.

There remains a final avenue by which an employee who has engaged in serious strike misconduct may reach reinstatement notwithstanding an attempted discharge or refusal to reinstate. This avenue is the doctrine of *condonation* which recognizes that the employer may elect to waive its right to discipline the employee for his serious strike misconduct. Id. at 1065. Condonation of unprotected activity will not be readily inferred, but must be based on clear, convincing, and positive evidence that the employer has agreed to forgive such misconduct and desires to continue the employer-employee relationship as though no misconduct had occurred. The Board does not look for any magic words suggesting the forgiveness, but it examines whether all the circumstances establish clearly and convincingly that the employer has agreed to ''wipe the slate clean'' respecting any employee misconduct. *White Oak Coal Co*., 295 NLRB 567, 570 (1989); *Fibreboard Corp*., 283 NLRB 1093, 1097–1098 (1987).

Reinstating some of the strikers does not condone the serious misconduct of others. *Longview Furniture Co*., 100 NLRB 301, 306 (1952). But offering reinstatement to the accused strikers, after the alleged misconduct and before the refusal to recall, condones the alleged misconduct. *White Oak Coal*. supra at 570–571. Even where reinstatement is not offered after the alleged misconduct, if the employer testifies at trial that it would have offered reinstatement had the striker been qualified for the job opening, then the employer thereby admits condonation of the alleged misconduct. Id. at 571 (Tony Deel).

In our case there is no dispute that the Government established a prima facie case. Although the General Counsel, in the Government's prima facie case, also undertook the procedurally unnecessary task of seeking to establish that the picket line was peaceful (2:258, 260), thereby opening the door for cross-examination on practically anything showing serious misconduct, it is clear (1) that the four Charging Parties participated in the strike and (2) that VAMCO, by its September 4, 1991 letters discharging each of the four, fired them expressly for ''your misconduct related to the work stoppage which began on June 20, 1991.'' I now turn to VAMCO's defense, its evidence of an honest belief.

2. Vamco's honest belief

a. *Introduction*

As I described earlier, Executive Vice President Charles Fugate, the person who made the final decision to discharge the four Charging Parties, had no itemized list of misconduct incidents for each Charging Party. That is, no list of items was extracted and compiled from the affidavits either at the time of decision or later. Thus, Fugate's testimony is, understandably, a largely confused effort to recall events from memory from his past reading of the 28–30 affidavits, as

eventually aided (over the repeated objections of the General Counsel and the Union) by leading questions and refreshing his exhausted memory from reading certain affidavits.

In Fugate's direct examination there is no testimonial linkage of his early September discharge decision to any specific misconduct attributed to Bobby Duncan or Randy Woodard, although he does describe specific incidents respecting Steven Birman on July 30 and Jimmy Crusenberry on August 2. As given by Fugate eventually, including the supporting testimony, the specific incidents linked to the discharge decision for each of the four individual Charging Parties are as follows. Without summarizing the General Counsel's rebuttal evidence or resolving credibility, I briefly mention the testimony of the accused strikers.

b. *Bobby Duncan*

Fugate testified that he fired Bobby Duncan because he threatened to burn the house of Jeff Cox and the business, Dryden Grocery, of his mother. Duncan also ''harassed'' Paul Bishop (John Paul Bishop Jr.) and three other employees and threatened to burn their homes. (3:748–749, 798–799, 806, 835–836.) Later Fugate, after refreshing his memory from Cox's July 11 affidavit (R. Exh. 10), attributes the same, or similar, houseburning threat against Cox to Randy Woodard. (3:829–831.)

Moreover, Duncan, with Woodard and Brian Marsee, threatened to physically harm Bishop and they hit and dented his truck. (3:832–833.) Fugate also lists, by general reference, club-swinging by Duncan because of ''discussions'' Fugate recalls. The club-swinging was a factor in the decision to fire Duncan ''If it was included in those affidavits, yes.'' (3:799.) The record does not disclose whether any of the affidavits which VAMCO collected describe Duncan participating in a club-swinging incident. Accordingly, I shall not address that as it is only a potential allegation not linked to any affidavit, witness, or any written report. Indeed, it is not linked to anything other than ''discussions.'' That feeble support is legally insufficient.

Jeffery Cox, a production supervisor since July 1990 (3:512, 527–528), testified that it was Randy Woodard (not Duncan) who uttered the house/grocery-burning threat on July 11 to Cox who was talking with maintenance employee Pete Carroll. (3:496–497, 514, 523, 530.)

John Paul Bishop Jr., who had enlisted in the U.S. Marine Corps (but not yet left for training) as of the trial, drove a fork lift and did setups at VAMCO during the relevant time. (3:547.) Bishop testified that he knows Bobby Duncan, that he had worked directly with him four or five times, and that Duncan knows Bishop's family. (3:554, 578–579.)

On July 12, Bishop testified, Bishop and employees John Burgin, Ted Garrett, and Larry Reynolds had just finished their lunch, outside, near the southwest corner of building 4. As Bishop and the others turned the corner to walk toward a door on the south side of building 4, strikers Duncan, Randy Woodard, and Keith Crusenberry, who were standing 20 to 25 feet away at the sign alerting the public to the end of state maintenance on Industrial Drive, began hollering ''scab'' and obscenities in accusing them of taking the strikers' jobs. When Bishop heard ''I know where you live,'' he turned around and saw Duncan pointing at him saying, ''Yes, you.''

Pointing to himself, Bishop said ''Me?'' Duncan replied, ''Yes, you Paul. You, f—k you. I know where you live. I'll get you. I'll get you.'' Bishop reported this to Jeff Cox (the supervisor, apparently) who told him to report the incident to Fugate, Parkey, and Attorney Wright. Bishop gave a statement to management either that day or later. He did not report the incident to the police. (3:544–559, 574–576). Contrary to Fugate's description, Bishop does not attribute any house-burning threat to Duncan. None of Bishop's three lunch companions testified.

Respecting the physical harm threat and truck-hitting incident, Bishop describes an incident on June 26 involving Brian Marsee and Randy Woodard, but he does not name Duncan as part of the event. (3:551, 572.)

In short, VAMCO's evidence links Fugate's discharge decision to a single incident of misconduct attributed to Bobby Duncan—Duncan's shouted (from about 25 feet or so) threat on July 12 to Paul Bishop, ''I know where you live. I'll get you. I'll get you.'' Duncan denies. (5:1055–1056, 1060.)

c. *Steve Birman*

Fugate describes two incidents as the reasons he decided to fire Steven Birman. The first occurred on July 30 when Fugate personally observed Birman toss jackrocks under a truck semitrailer of Triad Packaging as the Triad vehicle left VAMCO's premises after a delivery. The second incident occurred August 5 and is based on a report by VAMCO's local truckdriver, Chester Langley, involving jackrocks and Birman.

Jackrocks were displayed at the hearing. A jackrock typically is a device formed by crossing, twisting, and soldering two large nails, with sharp points at each end, in a manner that the now four-pronged jack will settle with a sharp spike projecting up no matter how it is tossed or lands. Virginia's Criminal Code, sec. 18.2–147.2 (R. Exh. 1), outlaws even the mere possession of jackrocks because they ''are primarily designed for the purpose of disabling motor vehicles by the puncturing of tires.'' Fugate describes (3:714–715) jackrocks seen in this case as having four legs or spikes about 2 to 2.5 inches long.

Respecting the July 30 incident, Fugate testified that the Triad driver arrived complaining of a threat on his way in and asking that the police be called to escort him out. Fugate did not call the police but he did have Kevin Pierce, an inventory clerk (3:708, 757), follow the big Triad semi out while Fugate observed from a conference room window near the southwest corner of building 4. (Building 4, recall, is the closest of the buildings to the picketing situs.) (3:696–698, 704–708.)

Fugate's vantage point was about 200 feet from where Birman was stationed with the strikers between points E and D on Joint Exhibits 1 and 4. (3:715–717.) (Fugate testified that nothing obstructed his view 3:718–719. The conference room window through which Fugate was observing sits about 35 feet or so (as figures on J. Exh. 4 suggest) from the edge of Industrial Drive. Thus, the angle for Fugate's line of sight was from Birman's right rear to right side, and Birman was leaning back against a Blazer vehicle. Tr. 3:723. The angle of sight, in other words, is a factor to be considered in addition to the distance.)

According to Fugate, as the Triad semi passed by on its way out, Birman tossed jackrocks in front of the tractor's

rear tandem axles. (Tr. 3:699–700, 724 and 751.) Fugate testified that Union Representative Barry Mark Hall, standing by Birman, laughed. (3:699, 719, 723 and 808.) Hall did not testify. The Triad semi did not stop. Fugate does not know if Triad reported any damage, but assumes there was no damage because a young girl retrieved two jackrocks and gave them to Birman after the two vehicles passed. (3:700, 719, 724–725.) Fugate did not notice (3:724) whether VAMCO's trailing pickup, driven by Kevin Pierce, swerved to miss anything in the road, but it did not get a flat. (3:724.) Fugate did not report the matter to the police. (3:727, 762.)

Fugate testified that Birman's tossing the jackrocks under the Triad semi was a major factor in his decision to fire him. (3:817, 821.) Kevin Pierce, the driver of VAMCO's pickup which followed the Triad semi, presumably was following in a manner to see and be seen by the strikers. Clearly Pierce was in a much better position than Fugate to observe any incident. Pierce did not testify. Cases such as this frequently have witnesses who made videotape of incidents. If VAMCO videotaped any incidents, or otherwise captured any incidents on camera or motion pictures, no such evidence was offered. Indeed, other than the aerial photograph of the area, there is no evidence that VAMCO sought to make use of cameras, motion pictures, or videotape. And even though there is testimony that strikers frequently brandished clubs (apparently big sticks of lumber some of the strikers admittedly had for whittling to pass the time), there is not so much as a single still photograph of strikers holding the sticks in the fashion of a club or even as a baseball bat.

Chester Langley drives a truck locally for VAMCO, around the premises, to a warehouse off the premises, and to a landfill. He knows Steve Birman. (3:614.) As Langley returned from the landfill and warehouse on August 5, about 10 to 14 pickets were stationed on Langley's right, or passenger side, as he approached VAMCO's entrance. (3:615, 634.) Langley saw jackrocks spread across Industrial Drive opposite where the strikers were standing. Langley swerved to the left attempting to miss the jackrocks. As he passed on, Langley looked in his mirror and saw Birman run out into the road, appear to pick up objects, and return to the group of strikers. (3:616, 634.) After arriving at the plant, Langley checked his tires and found a jackrock embedded in one. He called over Ron McCoy, his supervisor, who took the jackrock. (3:614–618.) The tire, one about midway on the right side (3:630), was punctured but still holding air because of the jackrock's presence. (3:635.)

Langley knows Birman by sight, not by name. McCoy identified Birman's name for Langley at the scene that day. (3:625–626.) (At the hearing Langley identified Birman as the person he saw. 3:635.) Langley concedes that he only assumes that Birman picked up the jackrocks when he ran out because he really could not see. (3:626–627.) Langley also admits that he did not feel it when his tire picked up the jackrock because the truck is very loud. However, he checked the 10 tires before leaving from the warehouse. He never saw Birman throw anything. (3:627–631.) Langley nevertheless believes that he picked up the jackrock from those in the road in front of the strikers, and he believes that Birman went out after the truck passed and picked up jackrocks. (3:636.) Langley reported the incident to management. (3:636.)

Fugate did not describe the Langley incident until his redirect examination when he was asked about Langley. Recalling that Langley had a jackrock incident and a jackrock being pulled from a tire, Fugate could not recall which striker the incident was linked to until shown Langley's affidavit (R. Exh. 9) of August 5. (3:826–828.) Fugate then testified ''this incident'' played a ''vital role'' in his final determination to discharge Steve Birman. ''All the actions that were set forth in those affidavits that listed those illegal activities, played a vital role. They were the entire basis for the decision to discharge those people.'' (3:828.) Birman denies both incidents. (5:987–989.)

d. *Jimmy Crusenberry*

Fugate describes two incidents as the basis for Jimmy Crusenberry's discharge. Actually, Fugate described only an August 2 incident on direct examination (3:695–697), and not until cross-examination did he vaguely mention (giving no date) a second event which he described as Crusenberry's handling jackrocks in the presence of Sam Church, the Union's International representative. (3:752.) When the Union inquired about the topic counsel referred to August 30, and Fugate neither confirmed nor corrected the date. (3:806–807.) On redirect examination, counsel asked if the second incident occurred on July 29, and Fugate said ''That's right.'' (3:821.) According to Fugate, the July 29 and August 2 incidents had a ''major role'' in the decision to fire Crusenberry. (3:751–752, 821, and 837.)

As July 29 occurs first, I shall address that event first. Fugate eventually asserts that, on this occasion, Sam Church and Crusenberry were at the picket situs at a folding table having a discussion while ''going through some green-barred computer paper.'' During that process, Crusenberry ''was handling jackrocks.'' Fugate understands that mere possession of jackrocks is against Virginia law. For ''several reasons'' Fugate did not call the police or file a charge so a warrant would issue. (3:806–808.)

No evidence was offered that Fugate recorded any of this on videotape or even on a camera with a telephoto lens. Although Fugate does not give the diagram (J. Exh. 4) or photo (Jt. Exh. 1) location of Church and Crusenberry, presumably they were situated at the general picket situs just north of point D, or about 75 to 80 yards (225 to 240 feet) from Fugate's window viewpoint.

Actually it is not necessary to presume, for Sam Church confirms his presence there with some voter registration printouts about late July that Crusenberry helped him with. (5:1079–1081.) Church emphatically denies there were any jackrocks in his presence (5:1082), and Crusenberry also denies handling jackrocks on that occasion or ever having jackrocks other than what was found one morning (under strikers' vehicles) and turned over to the police. (5:1040–1044.)

I generally have limited the description in this section to VAMCO's honest-belief evidence. Strictly, however, all the evidence is available for consideration, as necessary. Indeed, all record evidence eventually must be weighed before a decision on the merits is made. *Greco & Haines*, 306 NLRB 634 (1992). Fugate does not disclose whether he made a contemporary memo about the incident. Summing up as to this event, it is limited to Fugate's asserted observation that

Crusenberry, in Sam Church's presence, was openly holding jackrocks—a criminal offense in Virginia.

Turn now to Fugate's description of the August 2 incident. From his window vantage point in building 4 about 10:30 that morning, Fugate testified, he observed Jimmy Crusenberry, Anthony Goodman, Geoffrey Lewis, and (Barry) Mark Hall standing near the center of Industrial Drive opposite a spot south of the driveway of the mental health clinic; that is, south of point E on the photo and diagram. Hall, Fugate testified, is a representative of the Union. The VAMCO pickup, Kevin Pierce driving, approached the plant and the group moved toward the east or picket situs side of the road. As Pierce began to pass, Crusenberry turned and, with an underhanded motion, tossed two jackrocks behind, it appeared, the (right) front wheel. (3:695–697, 730–732, and 804–806.) That is, the toss was made when the driver probably could not observe and in an attempt to land the jackrocks so that the pickup's right rear wheel would be punctured.

When the group moved over, Crusenberry's back was toward Fugate, but Crusenberry turned and in turning his front side momentarily passed in view of Fugate. (3:733.) As Crusenberry turned, Fugate saw Crusenberry's arm come ''across'' (3:733) and release ''it'' in ''a tossing motion underhand'' (3:805) from Crusenberry's position about 2 feet (3:806) from the pickup. ''I actually saw the jackrock leave the hand, hit the road, come to rest. I actually saw two of the jackrocks.'' (3:806.)

After the Pierce vehicle passed, Crusenberry walked over and picked up the jackrocks, turned and walked back to the group where, as Crusenberry held up one of the jackrocks (apparently Fugate made no telephoto or videotape of that moment), the group held a discussion. (3:697.) Fugate acknowledges that the pickup's tire did not sustain a puncture or flat. (3:733.) Geoffrey Lewis testified as a government witness before Respondent's honest-belief stage, but was not recalled to rebut any of Fugate's description. Also not called were Anthony Goodman or Union Representative Hall. Crusenberry did testify. In brief, Crusenberry denies. (5:1040.)

e. *Randy Woodard*

Other than confirming (3:702) that Randy Woodard is one of the four employees discharged ''for strike misconduct,'' Charles Fugate, in his direct examination, fails to describe even generally the kind of misconduct Fugate viewed as requiring or justifying the discharge of Woodard. Cross-examination revealed that Fugate could recall no specifics respecting Woodard other than that there were ''several'' incidents making ''a quite clear case on him'' (3:751) and that he was involved with ''threats'' and liked to walk to the property line and ''yell'' at employees as revealed by ''discussions with some of the employees'' (3:808).

At the trial Fugate could not recall the specifics given in the affidavits. (3:819.) On redirect examination of Fugate, and after it was clear that Fugate's memory was exhausted respecting Woodard, VAMCO was permitted (over objections by the General Counsel and the Union) to refresh Fugate's memory either by having him review an affidavit (R. Exh. 10) or by mentioning employee names to him. (3:820, 829–834.) That process elicited a brief identification of four incidents which played a ''vital'' role in Fugate's decision to discharge Woodard.

The four incidents are as follows, in the order listed by Fugate. First, Woodard threatened to burn Jeff Cox's residence and the business, Dryden Grocery, of Cox's mother. Second, at a grocery store Woodard threatened Ronnie ''Pete'' Carroll. Third, either Woodard or Brian Marsee threatened to ''mess'' up John Paul Bishop's face. And fourth, Woodard practically ran Joshua Carroll and David Carroll off the road by pulling in front of the Carroll vehicle, blocking its movement, then going to that vehicle for an agitated conversation with its occupants. VAMCO's supporting witnesses describe the incidents. In date sequence the four incidents are, briefly, as follows.

June 26. John Paul Bishop Jr. describes an incident in which, after hearing a thump on his vehicle, as he slowly passed a double row of strikers, he ''turned around and returned to the picket situs. Brian Marsee and Woodard stepped forward and invited him to get out so they could ''mess up'' Bishop's face. Woodard added that he knew where Bishop lived and that he could come get him there. (3:548–552, 562–564, and 572.) Woodard denies. (5:1023–1024, 1034.)

Early July. About the second week of the strike (about late June), a preliminary event occurred. (3:641, 650.) Woodard was in one vehicle, and in the second vehicle, a jeep, were Bill Morrison, the driver and a supervisor (3:639, 645–646), David Carroll, a forklift operator (3:668), Johnny Baker, an hourly production employee (3:639, 668–669), and the assistant supervisor, now supervisor, Joshua Carroll who was riding in the front passenger seat. (3:638–639.) Morrison and Baker did not testify. Baker no longer works at VAMCO. (3:680.) In this first incident Woodard allegedly drove very slowly in front of the Morrison jeep up Industrial Drive, thereby subjecting the four occupants of the jeep, as they passed the picketing situs, to jeers of ''Scab,'' ''Yellow dog,'' and threats of ''We'll get you; you'll be sorry.'' At trial Fugate did not appear to rely on this preliminary incident (3:835), and it only sets the stage for the second event a week later.

About a week later, or about early July, Joshua Carroll and his brother David Carroll assert, Woodard jumped his vehicle in front of the Morrison jeep only a short distance onto Industrial Drive from Highway 58 and then again began driving slow. When Joshua Carroll expressed a request that Morrison pass Woodard to avoid another slow-motion drive-by to the accompaniment of more jeers and threats, Morrison started to pass the Woodard vehicle. Woodard then veered his vehicle to the left, nearly forcing the Morrison jeep off the road. Morrison pulled in front of Woodard, stopped, got out, went back, and exchanged words with Woodard. As Morrison returned to the jeep, Woodard pulled to the front where he slowly preceded the jeep. For a second time the Morrison group was subjected to the jeers of names and threats. Although neither of the Carrolls asserts when he reported this veering incident to VAMCO, Fugate identified (3:833–835) David Carroll's affidavit (R. Exh. 11) of August 5 in this connection.

Woodard denies trying to run the Morrison vehicle off the road (5:1028) and asserts that he was driving normal when Morrison sped by him, stopped, got out, came back, and asked whether Woodard was trying to run him off the road,

to which Woodard answered no. Woodard pulled around and as Morrison passed the pickets he told them they had better do something about Woodard or Woodard was going to get his ass kicked. (5:1027–1028.)

July 11. This is the Jeff Cox incident which Fugate initially attributed to Duncan (3:749), but later, after refreshing his memory from Jeff Cox's July 11 affidavit (R. Exh. 10), charged to Woodard. (3:830–831.) On July 11 Jeff Cox, a supervisor in building 4, held a conversation with Ronnie ''Pete'' Carroll outside and to the west of building 4. Coming up to the sign alerting the public to the end of state maintenance for Industrial Drive, Woodard yell out asking Cox how he would like ''your house burned down,'' how would he like (his mother's) ''Dryden Grocery burned down,'' and ''I could beat your ass up there at Dryden Grocery.'' (3:496–497, 523, 525, 530–534, and 545–546.)

Although Ronnie ''Pete'' Carroll is described as either a maintenance worker (3:496, 514, 592) or a maintenance supervisor in his pretrial affidavit (G.C. Exh. 8; 3:595), no evidence establishes him to be a statutory supervisor. In any event, Ronnie ''Pete'' Carroll corroborates Cox's version. (3:590, 599, 610–611.) Woodard denies. (5:1021–1023, 1032–1034.) Ronnie Carroll and ''Pete'' Carroll are stipulated to be the same person. (3:620.)

August 3. The fourth and final incident occurred at the Black Diamond convenience store in nearby Stone Creek. Carroll testified that Woodard, pointing his finger at him and cursing in a loud voice, said, ''You need to join the Union. We'll see to that.'' The clerk said she wanted no trouble in the store and Carroll simply walked out. Although Carroll does not recall the date of this incident, he remembers that it was the weekend before he gave his affidavit (G.C. Exh. 8) of (Monday) August 5 to the company. (3:594.)

As I mentioned above, Fugate testified (after being asked about any threats to Ronnie Carroll) that the off premises-grocery store threat to Carroll played a ''vital'' role in the discharge decision. (3:832.) Called as a rebuttal witness as to other matters, Woodard was not asked about the Black Diamond incident and therefore offered no conflicting version.

f. *Case 11–CB–2035*

Earlier I referred to Case 11–CB–2035 and the August 30 telephone calls between the Board's Region 11 and VAMCO's attorney and then between the attorney, Trial Counsel Wright, and Fugate, respecting the ''14 counts'' that the Region would include in the complaint, absent settlement. Fugate implies that Attorney Wright informed him that Region 11 would issue a complaint based on the conduct of several named employees. Fugate remembers only eight of the names, including the four Charging Parties here. (3:814.) He made no list of the names during or after the call. (3:788.) Region 11's decision to issue a complaint based on a finding that these employees had violated the Act, Fugate testified, was a factor in VAMCO's discharge decision because VAMCO felt that Region 11's decision substantiated its own decision that the four individual Charging Parties had violated the law and that VAMCO was justified in taking action against the four. (3:703, 743–744, 747, 797, and 815.)

At the trial (1:14–15, 21–22; 3:77–778, and 824), in his posthearing submissions (Br. at 3; Reply Br. at 4), VAMCO's counsel, disappointed that Region 11's December 30 response to VAMCO's FOIA request did not name the offending employees, represented that VAMCO's discharge decision process involved matching incidents in the affidavits to the dates which the Region, on August 30, said would be listed in the complaint. Distilled from that process are the names of the Charging Parties. All of this is for the purpose, as counsel describes, of showing that its honest-belief burden is met, at least in part, under *Gem Urethane Corp*., 284 NLRB 1349, 1352–1353 (1987), a case where an employer properly relied on a CB case complaint issued (then settled) naming specific strikers and specific dates and acts of alleged misconduct.

Several problems attend VAMCO's position. First, an attorney's representations do not serve as positive evidence that can be used in carrying the party's burden of proof on an issue (but they may be used by the opponent as admissions if they constitute such). Second, there is a gap here between the attorney's representations and the evidence. Fugate never describes a process of matching names against dates. Nor does Fugate say that Attorney Wright reported that he had done so and that Fugate in good faith relied on Attorney Wright's analysis. Thus if, as represented by Attorney Wright (Br. at 3; Reply Br. at 4), and contrary to the Region's December 30 response (R. Exh. 3) to the FOIA request, a Board agent at Region 11 identified specific incidents, that fact also is lacking in the evidence. To paraphrase the poet, the reach of the attorney's representations exceeds the grasp of his client's proof.[6]

Third, and as the General Counsel (1:16) and the Union (1:19) observed at trial, there is nothing in Region 11's FOIA response linking any of the four Charging Parties to any of the allegations or dates of the proposed complaint in Case 11–CB–2035. Although counsel for the General Counsel represented at trial that the Region's decision to issue a complaint in the CB case was in keeping with the General Counsel's policy when the Region is not able to make certain crucial credibility determinations (1:16–17), she acknowledged (1:26) that no evidence of that inability-basis would be introduced.

Despite VAMCO's disagreement with counsel's premise, and arguing that a regional decision to issue a complaint means a regional finding of merit (1:25), I note that the General Counsel's casehandling instructions to the regions contain the following paragraphs in NLRB Casehandling Manual (Part One) (June 1989):

> 10060. *Credibility*: In the event of hearing, credibility questions may be critical. In view of this, the following points should be kept in mind.
>
> On the basis of its investigation, The Regional Office is expected to resolve factual conflicts.
>
> . . . .
>
> In the infrequent case in which (a) applying all relevant principles, the Region is unable to resolve credibility, and (b) the resolution of the conflict *means the difference between dismissal and issuance of complaint*, a complaint should be issued. This is not to be construed, however, as permitting the avoidance of the making of difficult decisions.

Countering VAMCO's citation of *Gem Urethane Corp*., 284 NLRB 1349, 1352 (1987) (employer could base honest

[6] R. Browning, *Andrea Del Sarto*, L. 97.

belief on issuance of CB complaint where strikers named, dates given, and incidents specified), the General Counsel (Br. at 7) relies on *GSM*, 284 NLRB 174 fn. 1, 177 (1987), where a CB complaint issued but, as here, did not name any strikers as having engaged in specific incidents of alleged misconduct. The administrative law judge there rejected a contention that GSM could rely on the CB complaint to show an honest belief. On the basis the complaint did not identify the strikers, the Board affirmed the judge. I agree with the General Counsel that *GSM* applies here.

Finally, and as noted much earlier, the 28–30 affidavits VAMCO furnished to Region 11 named more strikers than simply the four and frequently covered more than one incident. Even so, while that might bear on credibility, it would not mean that VAMCO had failed to offer evidence of an honest belief had VAMCO in fact offered evidence that it matched affidavits with dates (and possibly incidents as well) supplied by Region 11. VAMCO offered no such evidence. Accordingly, I find that Region 11's August 30 notification to the parties of its determination to issue a complaint, absent settlement, in Case 11–CB–2035 does not constitute evidence in support of an honest belief by VAMCO in this case that the four individual Charging Parties here had engaged in any of the strike misconduct for which VAMCO discharged them on September 4.

3. Condonation

a. *Facts*

As I mentioned earlier, in the breakroom in building 1 the morning of August 12, Fugate addressed the strikers who had gathered. Charging Party Woodard places the number at 20 to 22 (1:203), whereas Fugate estimates the number at 35 to 40 (3:735.) Fugate asserts that all the returning strikers were wearing military-type camouflage dress, gathered in a small room, and he suggests that he found that fact a bit disconcerting. (3:734–735, 791.) Fugate specifically recalls that Bobby Duncan and Randy Woodard were standing close to him. (3:735, 791.) Jimmy Crusenberry (1:99) and Steven Birman (2:268) testified that they also were there.

Fugate told the group that VAMCO could accommodate only eight that day, but that the remainder of them would be called back as production increased and as there was work for them to perform. (3:735–736, 786.) Fugate admits that he made no exceptions. (3:787.) The strike, Fugate testified, had reduced VAMCO's production by half. (3:736.) Full production was not again reached until the third week of September. (3:702.) Thus, Fugate testified, there was no debate (among management) about anyone not being recalled. Instead, it simply was a matter of ''Let's start scheduling, let's start getting our production up, what do we do and who do we get in here first.'' (3:764–765).

When objection was made to the relevance of Fugate's presence at any discussion of the schedule for recall (3:766), witness Fugate was asked to step outside the courtroom. (3:767.) After Fugate withdrew, a lengthy colloquy ensued in which, eventually, the Union revealed (3:770, 784) that it was pursuing the concept of condonation (touched on briefly, but without name, by the General Counsel, 3:735). Respondent argued that the circumstances did not show condonation.

Although expressing doubt that condonation was shown (at that point) I, in effect, overruled the objection to relevance and permitted the Union to proceed. (3:785.) The additional point here, however, is that it appears there had been no previous discussion among the parties about the topic. That is, the topic of condonation was a surprise.

In any event, on Fugate's return to the stand the Union resumed its cross-examination. (3:785.) At the second question, asking for confirmation that Fugate met with the strikers when they showed up at the breakroom on August 12, VAMCO's counsel, attorney Wright, objected (emphasis added): ''Objection. I mean—again, I don't think the *condonation* theory is relevant.'' ''Your Honor, we might as well have left this man in the room,'' Union's counsel, attorney Vergara, protested. To that VAMCO's attorney stated, in part, ''I thought we pretty much had that resolved that under these circumstances, the *condonation* theory is irrelevant.'' Attorney Vergara objected that VAMCO's attorney ''is defeating the entire purpose of having the witness excluded from the room.'' I overruled VAMCO's objection. (3:786).

Despite VAMCO's attorney having twice injected the word ''condonation'' into his objections,[7] in the presence of a witness previously excused from the hearing room while that concept was discussed, Fugate nevertheless testified (3:787), as noted, that he made no exceptions to his statement that all of the strikers would be recalled as production needs dictated.

Still later Fugate testified that it was after August 12 before he became aware he could terminate any of the strikers for misconduct during the strike. (3:809.) Then the Union asked if it were true that on August 12 ''you intended to bring everybody back and subsequent to that you had a change of heart, so to speak?'' ''Yes,'' Fugate answered. (3:809–810).

Finally, Fugate confirms that many of the 28 to 30 affidavits had been taken before August 12. (3:810.) Indeed, as to this last item, we already have seen that every incident which Fugate (eventually) itemized at trial occurred before August 12. Most of them are dated well before August, with the latest dates being affidavits taken on August 5. Fugate even personally observed, according to his trial testimony, incidents on July 30 and August 2 involving Crusenberry and Birman.

b. *Discussion*

In short, the morning of August 12 Fugate was well aware of the incidents for which VAMCO, on September 4, fired the four Charging Parties, yet Fugate, on August 12, told all—and not excluding any of the four Charging Parties who were present—that all of them would be returned as production returned to normal. If that were not enough, Fugate admits that as of August 12 he intended to return all of the strikers, and only later did he change his mind (when he learned he could fire them for misconduct during the strike). Although Fugate on August 12 was not aware of his legal rights respecting striker misconduct, he was well aware of the underlying facts. Waiving those facts, he told all—as he admits he then intended—that all would be recalled as production resumed.

By Fugate's August 12 conscious waiver of the alleged misconduct, I find that VAMCO condoned any serious mis-

[7] The prophet's denunciation rings clear: ''[Y]et they are not at all ashamed, they know not how to blush.'' Jer. 8:12.

conduct which any of the four individual Charging Parties may have committed. I therefore find that VAMCO violated Section 8(a)(1) of the Act when it discharged Bobby Duncan, Steve Birman, Jimmy Crusenberry, and Randy Woodard for strike misconduct. Accordingly, I shall order VAMCO to offer the four reinstatement and to make them whole, with interest. *White Oak Coal Co*., 295 NLRB 567 (1989). Because I need not reach the allegation of an 8(a)(3) violation, I shall dismiss complaint paragraphs 11 and 12 in that respect. *General Telephone Co*., 251 NLRB 737, 740 fn. 21 (1980).

Having found that VAMCO condoned any serious misconduct, I need not address the General Counsel's rebuttal evidence (beyond the brief descriptions already given) nor resolve credibility over disputed facts.

CONCLUSIONS OF LAW

1. Respondent VAMCO is an employer engaged in commerce within the meaning of 29 U.S.C. § 152(2) and (7).

2. VAMCO has engaged in unfair labor practices within the meaning of 29 U.S.C. § 158(a)(1) when:

a. Plant Superintendent Daniel Hurd, on June 20, 1991, told packing line employees that anyone not reporting for work the next day would receive an ''unexcused'' absence.

b. VAMCO, by letters dated September 4, 1991, fired Bobby Duncan, Steve Birman, Jimmy Crusenberry, and Randy Woodard for strike misconduct.

3. The unfair labor practices found affect commerce within the meaning of 29 U.S.C. § 152(6) and (7).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Virginia Manufacturing Company, Inc., Pennington Gap, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in concerted activities protected by the National Labor Relations Act.(b) Threatening employees with disciplinary action if they join or support a protected strike.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Bobby Duncan, Steve Birman, Jimmy Crusenberry, and Randy Woodard immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its plant in Pennington Gap, Virginia copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''